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MAY 3 - 2011

SURFACE TRANSPORTATION BOARD

John Duncan Varda
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April 28, 2011

APR 29 2011 RECEIVED

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2011
SURFACE TRANSPORTATION BOARD

Via Federal Express

Surface Transportation Board
Attn: Finance Docket No. 35476
395 E Street, S.W., Room 1034
Washington, D.C. 20423-0001

Re: Finance Docket No. 35476
Wisconsin Central Ltd. - Intra-Corporate Family Merger Exemption - Duluth, Missabe and Iron Range Railway Company and Duluth, Winnepeg and Pacific Railway Company.

Greetings:

Enclosed for filing is the original and 10 copies of the "Petition for Revocation of the Exemption Under 49 U.S.C. 10502(d) Filed on Behalf of the Wisconsin Central Group."

Also enclosed for your stamped verification of receipt of this filing is a duplicate of this cover letter and a return mail envelope, postage prepaid.

You kind assistance is very much appreciated. If there are any questions or problems with this filing please email or call the undersigned at your earliest convenience.

Sincerely,

DEWITT ROSS & STEVENS s.c.

John Duncan Varda

John Duncan Varda

JDV:mc/mso
Enclosures

cc: Thomas J. Litwiler, Esq., Fletcher & Sippel LLC (Via FedEx, w/enclosure)

229437

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35476

WISCONIN CENTRAL LTD. – INTRA-CORPORATE FAMILY MERGER EXEMPTION – DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY AND DULUTH, WINNEPEG AND PACIFIC RAILWAY COMPANY

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MAY 5 - 2011
SURFACE TRANSPORTATION BOARD

PETITION FOR REVOCATION OF THE EXEMPTION UNDER 49 U.S.C. 10502(d) FILED ON BEHALF OF WISCONSIN CENTRAL GROUP
(an *ad hoc* rail freight shippers coalition)

FILED
MAY 5 - 2011
SURFACE TRANSPORTATION BOARD

John Duncan Varda
Attorney for
Wisconsin Central Group

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Dated: April 28, 2011
Due: April 29, 2011

BEFORE THE
SURFACE TRANSPORTATION BOARD

FINANCE DOCKET NO. 35476

WISCONIN CENTRAL LTD. – INTRA-CORPORATE FAMILY MERGER EXEMPTION – DULUTH, MISSABE AND IRON RANGE RAILWAY COMPANY AND DULUTH, WINNEPEG AND PACIFIC RAILWAY COMPANY

WISCONSIN CENTRAL GROUP
PETITION FOR REVOCATION OF THE EXEMPTION UNDER 49 U.S.C. 10502(d) FILED ON BEHALF OF

IDENTIFICATION OF WISCONSIN CENTRAL GROUP

Wisconsin Central Group (www.centralcorridors.com/wcg) is an *ad hoc* rail freight shippers coalition operating under the auspices of:

- Wisconsin Paper Council (www.wipapercouncil.com);
- Wisconsin Manufacturers & Commerce (ww.wmc.org); and
- Michigan Forest Products Council (www.michiganforest.com).

The goal of Wisconsin Central Group ("WCG") is to persuade the Canadian National Railway Company (the "Railroad"), if necessary, by other means, to assure: (a) Restoration of Wisconsin Central System ("WC System") level service and competition for market share for traffic that originates and/or terminates on lines of the former WC System; and (b) for

CN's main line between Superior. Wisconsin and Chicago, Illinois, a transparent plan, executed in due course, to mitigate the impact of increasing Prince Rupert traffic and to provide ample capacity for serving current and increasing future traffic that originates and/or terminates on lines of the former WC System.

Our group, under various names, was present (including participation in various ICC proceedings) for the transition following Staggers and the Motor Carrier Act of 1980. In the mid-1980s through the early 1990s, we were present for the withdrawal of the Class Is from Wisconsin and Upper Michigan through various spin-offs. In the late 1980s and into the 1990s, we were present for the creation, consolidation and successes of the independent Wisconsin Central System. And, of course, we were present for the grant of control of the WC System to Canadian National and its aftermath.

STATEMENT OF THE GROUNDS AND PURPOSE FOR THIS PETITION

Since shortly following the Board's grant of control of Wisconsin Central Transportation Corporation ("WC System"), including Wisconsin Central Ltd. ("WCL"), to Canadian National (the "Railroad"), in *Canadian National – Control – Wisconsin Central,* Finance Docket No. 34000, Decision and Order, September 7, 2001, the Railroad has systematically failed and refused to effectively compete for freight originating and/or terminating on lines of the WC System, including WCL. See *Review of Commodity, Boxcar and TOFC/COFC Exemptions*, Docket EP 704, "Verified Statement on Behalf of Wisconsin Central Group," dated January 25, 2011, and *Competition in the Railroad Industry*, Docket EP 705, "Wisconsin Central Group, Initial Comments," dated April 8, 2011, attached hereto and incorporated herein by reference.

The statutory mandate to the Board, 49 U.S.C. § 10502(d), provides:

> The Board may revoke an exemption, to the extent it specifies, when it finds that application in whole or in part of a provision of this part to the person, class, or transportation is necessary to carry out the transportation policy of section 10101 of this title.

Among the elements of the national Rail Transportation Policy implicated here, are: 49 U.S.C. § 10101(4), "to ensure . . . effective competition among rail carriers **and with other modes**"; and (5) "to ensure effective competition and coordination **between rail carriers and other modes.**" [Emphasis added.]

In the Notice of Exemption in this proceeding, as reported at F.R., Vol. 76, No. 78, p. 22748 (April 22, 2011) (emphasis added):

> The parties state that the transaction will not result in . . . **any change in the competitive balance with carriers outside of the corporate family.**

The term "carriers" at 49 CFR 1180.2(d)(3) includes carriers of other modes, including motor carriers. In light of the specific mandate of the national Rail Transportation Policy, 49 U.S.C. §§ 10101(4) and (5), and the relevant circumstances of the Railroad's failure and refusal to compete for freight, in particular non-captive freight that was the life blood of the WC System, including WCL, the fact that the Notice of Exemption contains no mention of competition with other modes raises a significant concern for WCG.

WCG's concern is that the parties and the Railroad **assure that the merger** of the two rail carriers (DMIR and DWP, as referenced in the Notice of Exemption) into WCL **will in no way preclude, hinder, impair or impede corrective actions that may be taken by the Railroad, whether voluntary or pursuant to action by this Board, to assure effective competition for freight, particularly non-captive freight, originating and/or terminating on lines of the WC System, including WCL.**

Addition of a statement of the requested assurance to the Notice of Exemption (by amendment or supplement) will satisfy WCG's concern.[1] Upon receipt of evidence of such a statement, WCG will promptly stipulate to dismissal of this Petition.[2]

---

[1] WCG requests that CN expressly concur in the assurance; however, a letter from counsel to that effect is sufficient.

[2] WCG has not sought a stay as WCG has no desire to delay cost savings and other operational benefits the parties state will be achieved by consummation of the transaction.

In the absence of such a statement, WCG requests the Board grant WCG's Petition for Revocation of the Exemption for the purpose of determining whether or not such "anticompetitive effects of the transaction outweigh the public interest" in assuring effective competition for non-captive freight originating and/or terminating on lines of the WC System, including WCL. 49 U.S.C. § 11324(d)(2).

Dated this 28th day of April, 2011.

Respectfully submitted,

John Duncan Varda, WI Bar No. 1014100
Attorney for
Wisconsin Central Group

Of counsel:

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jdvarda@dewittross.com

Certificate of Service

I, John Duncan Varda, hereby certify that a copy of the foregoing Petition for Revocation of the Exemption was served by express delivery up Thomas J. Litwiler, Fletcher & Sippel LLC, 29 North Wacker Drive, Suite 920, Chicago, IL 60606, this 28th day of April, 2011.

John Duncan Varda

BEFORE THE
SURFACE TRANSPORTATION BOARD

REVIEW OF COMMODITY, BOXCAR
AND TOFC/COFC EXEMPTIONS

STB Docket No. EP 704

VERIFIED STATEMENT

ON BEHALF OF

WISCONSIN CENTRAL GROUP

(an *ad hoc* rail freight shippers coalition)

John Duncan Varda
Attorney for WCGroup

Of Counsel:
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Dated: January 25, 2011
Due: January 31, 2011

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BEFORE THE
SURFACE TRANSPORTATION BOARD

REVIEW OF COMMODITY, BOXCAR
AND TOFC/COFC EXEMPTIONS

STB Docket No. EP 704

**VERIFIED STATEMENT ON BEHALF OF
WISCONSIN CENTRAL GROUP[1]**

IDENTIFICATION OF WISCONSIN CENTRAL GROUP

Wisconsin Central Group (www.centralcorridors.com/wcg) is an *ad hoc* rail freight shippers coalition operating under the auspices of:

- Wisconsin Paper Council (www.wipapercouncil.com);
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The goal of Wisconsin Central Group ("WCG") is to persuade the Canadian National Railway Company ("Canadian National" or "CN") or otherwise assure: (a) Restoration of Wisconsin Central System ("WC System") level service and competition for market share for traffic that originates and/or terminates on lines of the former WC System; and (b) for CN's main line between Superior, WI and Chicago, a transparent plan, executed in due course, to mitigate the impact of increasing Prince Rupert traffic and to provide ample capacity for serving current and increasing future traffic that originates and/or terminates on lines of the former WC System.

---

1 Verification and identification of the affiant follows the text of the statement.

WCG'S STATEMENT – IN SUMMARY

The problem is a failure of competition and competition policy.

Freight competition in our region has changed dramatically since the Exemptions were granted and since Class I's have reached their present level of consolidation. The Class I, Canadian National, which this Board granted control of the WC System in 2001, has utterly failed to compete for market share on traffic originating and/or terminating in our region on lines served by the former Wisconsin Central System. CN has strong incentives to not compete for, in fact to suppress, such traffic. Given the Exemptions, shippers and other stakeholders in our region, including those in the public sector, have no realistic means to get CN's attention to the problem, to say nothing of holding CN accountable or otherwise restoring rail competition in our region.

The Board should investigate potential revocation of the Exemptions. CN's treatment of the former Wisconsin Central System, as described in WCG's Statemtent, illustrates why the Board should do so.

Wholesale revocation of the Exemptions is not necessarily the answer. Small adjustments or targeted revocation of the Exemptions may better serve to: (a) give competition another chance, where failure of competition has been the unintended consequence of Class I consolidation: and (b) provide adequate oversight and effective means by which individual shippers might bring attention to such problems on a case-by-case basis.

WISCONSIN CENTRAL GROUP'S STATEMENT

Competition in Our Region, 1980s, Before the WC System.

By the mid-1980s, Soo Line Railroad Company ("Soo") and Chicago & Northwestern Transportation Company ("CNW"), the Class Is serving most of the lines that later became the WC System, were reeling from motor carrier competition unleashed by the Motor Carrier Act of 1980. Soo, having just acquired lines of the bankrupt "Milwaukee Road," reorganized its lines in central Wisconsin and Upper Michigan into its "Lakes States Division," which it spun-off to the newly created Wisconsin Central Ltd., in 1988. Shortly, thereafter, citing truck competition for paper industry traffic, CNW spun-off its lines serving Green Bay and the Fox River Valley (just south of Green Bay) to the Fox River Valley Railroad, under common control with the Green Bay & Western Railroad.

Competition in Our Region 1990s-2001, WC System.

WC System aggressively competed for market share in the region it served and was successful in increasing density of traffic originating and/or terminating on its lines, including lighter density feeder lines throughout its region.

WC System invested in new "paper grade" boxcars[2] and upgrading of its log car fleet to meet the needs of the paper and forest products industry in its region. Overall, WC System had great success in providing

2 "Paper grade" means water tight, no holes in roof or floor, a prime source of water damage in-transit.

sufficient and suitable railcars to meet the needs of shippers on its lines. WC System instituted "quality" programs in partnership with key shippers to measure and continuously improve performance on railcar supply for loadings, predictable and consistent train schedules and other customer satisfaction factors, including predictable and scheduled intra-plant and inter-terminal switching and short-haul inter-facility moves. WC System operated cleaning and inspection tracks to assure delivery of clean, good order railcars for loading and maintained a comprehensive and consistent damage control program that minimized claims and assured customer satisfaction. Due to WC System's competitive efforts to take traffic back from all-highway, outbound carloads from one on-line shipper grew from fewer than 1000 car loads per year in the late 1980s to a typical volume of over 2400 car loads per year through the remaining years that the service was controlled by WC System.

WC System established several truck-rail intermodal facilities, including daily service between Green Bay and Chicago which came to be strongly utilized and supported by Schneider National, the nation's largest truckload motor carrier, headquartered at Green Bay.

Negative Impact of Class I Consolidations.

WC System began and conducted most of its business during a period in which most of its traffic was exempt from regulation but also, a period mostly prior to many, and the most important, of the Class I consolidations. Most Wisconsin and Upper Michigan shippers supported the shortline consolidations that brought about the WC System, reducing local rail-to-rail competition.[3] They did so, however, without appreciating the long term impact of Class I consolidations on the ability of the WC System to continue to provide excellent service on its lines and competitive through rates from and to origins and destinations nationwide.

Year by year, WC System provided excellent, competitive service, earned its cost of capital and enjoyed strong stock prices right up to the point that its management team purportedly concluded that WC System's success and continued growth could not be sustained in the new Class I consolidated environment.[4]

What Canadian National Promised.

In *Canadian National – Control – Wisconsin Central,* Finance Docket No. 34000, Decision and Order, September 7, 2001, Item 5 of the Order, at p. 28, this Board ordered (emphasis added):

> **Applicants must adhere to all of the representations** they made on the record during the course of this proceeding, whether or not such representations are specifically referenced in this decision.

Among such "representations" was the following:

> We are confident that implementation of the CN/WC merger will proceed smoothly and will result in meaningful service improvements. **We plan to operate WC as the sixth division of the CN system in order to preserve WC's local characteristics** and the value of its employees' experience as much as possible while securing the benefits of system integration. **Among other things, this will assure that customers on WC's relatively low-density lines will continue to**

3 *Wisconsin Central Transportation Corporation, et al – Continuance in Control – Fox Valley & Western Ltd.*, 9 I.C.C.2d 233 (1992), petition to reopen denied, 9 I.C.C.2d 730 (1993); and *Sault Ste. Marie Bridge Company – Acquisition and Operation Exemption – Lines of Union Pacific Railroad Company,* Finance Docket 33290 (1997).

4 Shortly before reaching this conclusion, this management team had ousted WC System's founder and architect of its success and growth through the 1990s, who is believed to have disputed the conclusion and rationale for merger into CN.

> **receive the quality of service they have come to expect from WC.** We have provided a Service Assurance Plan that we are confident will assure customers that **service levels for each of them will be as good as or better than current levels.** [Emphasis added.][5]

And, this "representation":

> Shippers will enjoy transportation service that is as good as - **if not** better than - what they receive from CN and WC today.[6]

In other words, CN's top management represented to the Board that, notwithstanding the economic incentives CN enjoys as a long-haul Class I, it would maintain the "local characteristics" of the shortline or regional WC System. Chief among such "local characteristics" was Wisconsin Central System's aggressively competing for market share on traffic, to, from and within the region served by WC System lines.[7]

In the Verified Statement of E. Hunter Harrison, then Canadian National's Chief Executive Officer, in *Canadian National – Control – Elgin Joliet & Eastern*, Finance Docket 35087, October 30, 2007, Canadian National represented to this Board that:

> In the past decade, CN has acquired in the U.S. the Illinois Central, the Wisconsin Central and the GLT systems. As we expected, each of these transactions has added to our capacity to serve customers, and to [increase] our network efficiency. And, **as we promised**, in each transaction, CN met its commitments to integrate the new systems smoothly, **without any reduction in competition**, and to enhance the public interest in rail transportation. [Emphasis added]

In the real world of competition, Mr. Harrison's statement is patently not true. Because CN has and is failing to preserve the Wisconsin Central's

5 Verified Statement of Paul M. Tellier, Canadian National's Chief Executive Officer, p. 2, April 6, 2001, Surface Transportation Board Finance Docket 34000, *Canadian National – Control – Wisconsin Central.*

6 Verified Statement of James M. Foote, Canadian National's Executive Vice President, Sales and Marketing, p. 6, April 6, 2001, FD 34000, *supra.*

7 CN representations were significant, *inter alia*, because they were made in pleadings which became the basis for the Board determining the FD Docket 34000 to be a "minor" proceeding, thus, blocking inconsistent alternative applications.

"local characteristics," there has been and continues to be a significant reduction in competition.

CN's Failure to Compete on WC System Lines, 2001-Present.

By way of example, within a relatively short time after establishing its control over the WC System, CN:

- Eliminated the "Wisconsin Central Division" which it had promised to operate "in order to preserve the local characteristics" of the WC System.
- Instituted rationing of railcar supply (CN's so-called "Guaranteed Car Order" system, but quite the opposite), which continues to the present, under which shippers have reported over significant periods, and repeatedly, receiving as few as 60% of railcars ordered, despite the fact that the railroad was known to have cars of the type ordered "in storage".
- Terminated inspection and cleaning tracks, with resultant increase in delivery of dirty and bad order railcars for loading, increased loss and damage claims, increased destination customer dissatisfaction with their suppliers located on former WC System lines and, for those suppliers, consequent loss of competitiveness in their end markets.[8]
- Withdrew 60-foot boxcars (the basis for certain incentive rates) from lumber traffic originating on former WC System lines for destinations

8 Due to the railroad's rationing of railcar supply, shippers often face the dilemma of having to clean dirty cars themselves or accepting railcars of questionable quality or rejecting the car, doing without and suffering dissatisfaction of their own customers who planned for delivery via rail.

on the West Coast and in the Southwest and, thus, terminated CN's participation in the traffic.

- Increased boxcar rates on hardwood lumber originating in WC System lines in central Wisconsin, destined to Texas, the Southwest and West Coast such that the boxcar rate exceeded the cost on trucking three intermodal containers (equivalent to one boxcar) to intermodal connections in the Chicago area for furtherance to such destinations by 166% and, thus, terminated CN's participation in the traffic.
- Terminated intermodal facilities on former WC System lines including, despite pleas from shippers, Schneider National and other motor carriers, intermodal service between Green Bay and Chicago, operating in part **on its Superior-Chicago mainline** and, thus, terminated CN's participation in the traffic.
- Terminated a rail-to-truck trans-load operation for plastic pellets, on side track **on its Superior-Chicago mainline** and, thus, terminated CN's participation in the traffic.[9]
- Reduced from five and six days to three days per week, switching at pulpwood loading and recyclable facilities located **on its Superior-Chicago mainline**, even though traffic at those facilities remained strong.

9 The operation was established in 1997 through the efforts of WC to recruit a local trucker to lease side track and purchase specialized equipment to trans-load plastic pellets from private railcars for local delivery. CN initially attempted to unilaterally terminate the track lease and, failing that, at the next opportunity increased the track rental to a level that forced relocation of the trans-load operation to track on a short line (at no lease charge) but not as well located for the local deliveries.

- Declined, in 2008, to quote rates to return to rail a regular weekly movement of boxcars from east central Wisconsin to lower Michigan, routed in part **on its Superior-Chicago mainline**, amounting to some 650 carloads per year which would have taken 1,500 truckloads per year off the highways.[10]

Surveying the opinion of any former Wisconsin Central System shipper, anonymously, beyond the reach of retribution, will yield the opinion that Canadian National has and continues to consistently neglect to compete for, if not outright suppresses, traffic originating and/or terminating on former WC System lines.

CN's Incentives to Suppress WC System Traffic.

Traffic moving via the port of Prince Rupert has already significantly increased international traffic on the Superior-Chicago mainline. The build-out of Prince Rupert capacity by 2015 will dramatically increase this traffic, possibly enough to increase the number of international trains transiting the Superior-Chicago mainline from the current low 20s to the mid-60s.

Canadian National has consistently acted to reserve the available capacity on its Superior-Chicago mainline by neglecting to compete for and, apparently, outright suppressing domestic traffic originating and/or terminating on former WC System lines. The economic incentives of high volume, long-haul, international traffic trumps the economics of retail

10 This is the same shipper whose traffic increased form 1000 to 2400 cars per year as a result of WC Systems competitive efforts. The shipper's traffic has now dwindled to fewer than 20 carloads per year, the difference now moving all-highway.

railroading, shorter-haul (at least on CN) domestic traffic which was the bread-and-butter business of the former WC System.

That would seem incentive enough to explain Canadian National's failure and refusal to compete for market share on former WC System lines. However, for the last several years, CN has also had another incentive – the problem of dealing with EJ&E mitigation and oversight. Much of the traffic originating and/or terminating on the former WC System lines transits the Chicago gateway and can only add to CN's burden to comply with mitigation and oversight, such as street-crossing blockages in the communities along the EJ&E line.

With the Full Exemptions, Shippers Have No Meaningful Remedy.

Public sector enforcement of the conditions imposed in Finance Docket 34000, on Canadian National's control of Wisconsin Central System has been non-existent. Private enforcement of such conditions appears to require concerted action by many shippers and other stakeholders across central and northern Wisconsin and the Upper Peninsula and great expense. Full, partial or selectively targeted revocation of the Exemptions may provide reasonable means for case-by-case presentation of these issues to the Board.

Clearly, neither unregulated competition under the Exemptions nor the specific conditions imposed in Finance Docket 34000 have been adequate to assure the survival of the "local characteristics" of the

WC System, a promise and representation on which the Board relied in granting CN control of the WC System.

CONCLUSION AND REQUESTED ACTION

WC Group submits that the examples provided in this Statement illustrate why the Board ought to: (a) Conduct an in-depth investigation of the effectivencss of the Exemptions, changed circumstances and implications of revocation of the Exemptions; and (b) in particular, consider the pros and cons of limited and/or targeted revocation of the Exemptions to address failures of competition policy and conditions on Class I consolidations such as those illustrated by ten (10) years of Canadian National's control of the Wisconsin Central System.

Dated this 25th day of January, 2010.

[See the next page, following, for verification.]

Verification

I, John Duncan Varda, counsel to Wisconsin Central Group, have, since 1970, represented Wisconsin Manufacturers & Commerce and other Wisconsin and Upper Michigan transportation shpper groups and various of their constituent members before the Interstate Commerce Commission and, lately, before the Surface Transportation, and do hereby affirm and verify that I have read the foregoing Verified Statement on behalf of Wisconsin Central Group and know the facts stated therein to be true and correct to my own knowledge and, as to those stated upon information and belief, I reasonably believe them to be true and correct.

John Duncan Varda

John Duncan Varda

STATE OF WISCONSIN)
) SS
Dane COUNTY)

Personally came before me this 25th day of January, 2011, the above named John Duncan Varda, personally known to me to be the person who executed the foregoing verification and acknowledged the same.

Martha S Olson

Notary Public, State of Wisconsin

My commission 8/14/2011.

BEFORE THE
SURFACE TRANSPORTATION BOARD

COMPETITION IN THE RAILROAD INDUSTRY

STB Docket No. EP 705

WISCONSIN CENTRAL GROUP
(an *ad hoc* rail freight shippers coalition)

INITIAL COMMENTS

John Duncan Varda
Attorney for WCGroup

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Dated: April 8, 2011
Due: April 12, 2011

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BEFORE THE
SURFACE TRANSPORTATION BOARD

COMPETITION IN THE RAILROAD INDUSTRY

STB Docket No. EP 705

WISCONSIN CENTRAL GROUP
INITIAL COMMENTS[1]

IDENTIFICATION OF WISCONSIN CENTRAL GROUP

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1 Verification and identification of the affiant follows the text of the Initial Comments

current and increasing future traffic that originates and/or terminates on lines of the former WC System.

WCG'S INITIAL COMMENTS – IN SUMMARY

In our region, the problem is a failure of competition and competition policy. The primary competitiveness problem is not with captive freight but, rather, with non-captive freight – specifically freight which contributes to going concern value with revenue/variable cost ratios between 100 and 180.

Freight competition in our region has changed dramatically since the mid-1980s and since Class Is have reached their present level of consolidation. The Class I, Canadian National, which this Board granted control of the WC System in 2001, has utterly failed to compete for market share on traffic originating and/or terminating in our region on lines served by the former Wisconsin Central System, primarily non-captive freight. CN has strong incentives to not compete for, in fact to suppress, such traffic.

By quickly narrowing the focus of this Docket to "competitive access rules and policies," the Board's Notice appears to assume that competition for captive freight can be reviewed without regard to the railroad industry's competitiveness for non-captive freight. In reality, the burden of differential pricing borne by captive freight is largely a function of the effectiveness of railroad industry competition and market share for non-captive freight.

The primary competitiveness problem, from the perspective of the experience of those on the lines of the former WC System, involves incentives and level of rail competition for non-captive freight. From their perspective, the competitiveness problem is as much about service as it is about rates.

The Board's objective - exploring "competition in the railroad industry and possible policy alternatives to facilitate more competition" - ought to identify the level of competition for non-captive freight as a critical competitiveness problem and consider how to provide incentives and structural or regulatory changes that will facilitate competitive models for non-captive freight.

INITIAL COMMENTS

First, Do No Harm.

Heed the caution: Often, the worst enemy of a good result is a better result.

Here, that would translate to: Do not tinker with regulatory change before understanding how competitiveness is a problem and how change will achieve a better result without becoming the enemy of the good results of Staggers.

The Board's Notice of January 11, 2011 opening this Docket begins by saying that its purpose is to:

> [E]xplore the current state of competition in the railroad industry and possible policy alternatives to facilitate more competition, where appropriate.

Id., at p. 1. In its invitation to comment, the Board goes on to say:

> This proceeding is intended as a public forum to discuss access and competition in the rail industry, and **with a view to what, if any, measures the Board can and should consider to modify its competitive access rules and policies**; whether such modification would be appropriate given changes over the last 30 years in the transportation and shipping industries; the effects on rates and services these rules and policies have had; and the likely effects on rates and service of changes to these policies.

Id., at p. 5 (emphasis added). The Board itemizes seven (7) focal areas for comment, of which five ("alternative through routes," "terminal facilities access," "reciprocal switching," "bottleneck rates," and "access pricing") are notably specific to "competitive access rules and policies." Only two ("financial state of the railroad industry" and "impact of change") suggest the broader context – the current and prospective marketplace - necessary for an effective review of the "state of competition in the railroad industry," generally.

Why this narrowing of the focus? What happened to exploring the "state of competition in the railroad industry" as a whole? What happened to exploring "policy alternatives to facilitate more competition" more broadly, not merely focusing on "competitive access rules and policies"?

The Board's Notice seems too quick to narrow the focus in this way. In doing so, the Board appears to assume that "competition" is generic and to presume that the question to be addressed is to facilitate or not facilitate "more competition" (one size fits all) for captive freight and fails to address non-captive freight which contributes to going concern value with revenue/variable cost rations between 100 and 180.

The Christensen Report (EP 705 Notice, *supra*, at pp 2-3) does not appear to directly address or focus on the state of competitiveness in the railroad industry for non-captive freight. The Constrained Market Pricing principles were conceived in an era of many Class I competitors, an era of great excess and obsolete capacity which required the industry's attention to "rationalizing" the Nation's rail network. Those principals do not address, at least not directly, competing incentives for: (a) investing gains from differentially pricing captive freight to respond to needs for investment in new capacity to compete for non-captive freight and potential long term gain from increasing network volume; compared to (b) rationing capacity to maximize operating ratio and for short term profit and financial market value gains.

The primary competitiveness problem, from the perspective of the experience of those on the lines of the former WC System, involves the incentives and level of rail competition for non-captive freight. From their perspective, the "competitiveness problem" is as much about service as it is about rates and has not been a consistent problem over the years or from railroad to railroad.

Thus, WCG does not believe the Board can effectively consider changes in its access rules and/or policies and the impacts of such changes without considering the state of competition in the railroad industry for non-captive freight. As Chairman Elliott remarked at the outset of the February 24, 2011 hearing in *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, Docket No. EP 704,[2] some forty percent (40%) of railroad industry revenue, some $20 billion per year, is derived from exempt (*e.g.*, non-captive) freight. Witness after witness from the railroad and intermodal industries noted how very small a market share for non-captive freight the railroad industry enjoys and how that share has shrunk over the years that the Exemptions from regulation and the Board's access rules and polices have been in place.

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2 WCG has separately filed its notice of intent to participate and written testimony in *Review of Commodity, Boxcar, and TOFC/COFC Exemptions*, Docket No. EP 704, due January 31, 2011.

The Board cannot effectively review competitiveness and consider changes to its access rules and policies without considering how and to what extent the state of competitiveness in the railroad industry for non-captive freight is: (a) due to increasing competitiveness between and among modes, on the one hand; or, on the other hand, (b) due to other reasons such as a competitiveness problem within the railroad industry, such as that experienced by those on lines of the former WC System.

The impact of potential changes in the Board's access rules and policies may be directly related to a non-captive freight competitiveness problem which may, first, require reconsideration of the Exemptions, specifically an examination of 49 U.S.C. § 11101(a):

> A rail carrier providing transportation or service subject to the jurisdiction of the Board under this part shall provide transportation or service on reasonable request.

How the Board's access rules and policies can or ought to change, without adverse impact on the financial condition of the railroad industry may require the Board's consideration of policies and potential remedies available to the Board under 49 U.S.C. §§ 11121-23 (car service).

The testimony that follows will illustrate the non-captive freight competitiveness problem in the context of rail service in our region (essentially the region served by the former Wisconsin Central System lines) from the mid-1980s to the present.

Competition in Our Region, 1980s, Before the WC System.

By the mid-1980s, Soo Line Railroad Company ("Soo") and Chicago & Northwestern Transportation Company ("CNW"), the Class Is serving most of the lines that later became the WC System, were reeling from motor carrier competition unleashed by the Motor Carrier Act of 1980. Soo, having just acquired lines of the bankrupt "Milwaukee Road," reorganized its lines in central Wisconsin and Upper Michigan into its "Lakes States Division," which it spun-off to the newly created Wisconsin Central Ltd., in 1988. Shortly, thereafter, citing truck competition for paper industry traffic, CNW spun-off its lines serving Green Bay and the Fox River Valley (just south of Green Bay) to the Fox River Valley Railroad, under common control with the Green Bay & Western Railroad.

Competition in Our Region 1990s-2001, WC System.

WC System aggressively competed for market share in the region it served and was successful in increasing density of traffic, mainly non-captive freight, originating and/or terminating on its lines, including lighter density feeder lines throughout its region.

WC System invested in new "paper grade" boxcars[3] and upgrading of its log car fleet to meet the needs of the paper and forest products industry in its region. Overall, WC System had great success in providing

3 "Paper grade" means water tight, no holes in roof or floor, a prime source of water damage in-transit.

sufficient and suitable railcars to meet the needs of shippers on its lines. WC System instituted "quality" programs in partnership with key shippers to measure and continuously improve railcar supply for loadings, predictable and consistent train schedules and other customer satisfaction factors, including predictable and scheduled intra-plant and inter-terminal switching and short-haul inter-facility moves. WC System operated cleaning and inspection tracks to assure delivery of clean, good order railcars for loading and maintained a comprehensive and consistent damage control program that minimized claims and assured customer satisfaction. Due to WC System's competitive efforts to take traffic back from all-highway, outbound carloads from one on-line shipper grew from fewer than 1000 car loads per year in the late 1980s to a typical volume of over 2400 car loads per year through the remaining years that the service was controlled by WC System.

WC System established several truck-rail intermodal facilities, including daily service between Green Bay and Chicago which came to be strongly utilized and supported by Schneider National, the nation's largest truckload motor carrier, headquartered at Green Bay.

Class I Consolidations, Negative Impact on Competitiveness.

WC System began and conducted most of its business during a period in which most of its traffic was exempt from regulation but also, a period mostly prior to many, and the most important, of the Class I consolidations. Most Wisconsin and Upper Michigan shippers supported the shortline consolidations that brought about the WC System, reducing local rail-to-rail competition.[4] They did so, however, without appreciating the long term impact of Class I consolidations on the ability of the WC System to continue to provide excellent service on its lines and competitive through rates from and to origins and destinations nationwide.

Year by year, WC System provided excellent, competitive service, earned its cost of capital and enjoyed strong stock prices right up to the point that its management team purportedly concluded that WC System's success and continued growth could not be sustained in the new Class I consolidated environment.[5]

Canadian National Promised WC System Level Competitiveness for Freight Originating and/or Terminating on former WC System Lines.

In *Canadian National – Control – Wisconsin Central,* Finance Docket No. 34000, Decision and Order, September 7, 2001, Item 5 of the Order, at p. 28, this Board ordered (emphasis added):

4 *Wisconsin Central Transportation Corporation, et al – Continuance in Control – Fox Valley & Western Ltd.*, 9 I.C.C.2d 233 (1992), petition to reopen denied, 9 I.C.C.2d 730 (1993); and *Sault Ste. Marie Bridge Company – Acquisition and Operation Exemption – Lines of Union Pacific Railroad Company*, Finance Docket 33290 (1997).

5 Shortly before reaching this conclusion, this management team had ousted WC System's founder and architect of its success and growth through the 1990s, who is believed to have disputed the conclusion and rationale for merger into CN.

> **Applicants must adhere to all of the representations** they made on the record during the course of this proceeding, whether or not such representations are specifically referenced in this decision.

Among such "representations" was the following:

> We are confident that implementation of the CN/WC merger will proceed smoothly and will result in meaningful service improvements. **We plan to operate WC as the sixth division of the CN system in order to preserve WC's local characteristics** and the value of its employees' experience as much as possible while securing the benefits of system integration. **Among other things, this will assure that customers on WC's relatively low-density lines will continue to receive the quality of service they have come to expect from WC.** We have provided a Service Assurance Plan that we are confident will assure customers that **service levels for each of them will be as good as or better than current levels.** [Emphasis added.][6]

And, this "representation":

> Shippers will enjoy transportation service that is as good as - if not better than - what they receive from CN and WC today.[7]

In other words, CN's top management represented to the Board that, notwithstanding the economic incentives CN enjoys as a long-haul Class I, it would maintain the "local characteristics" of the shortline or regional WC System. Chief among such "local characteristics" was Wisconsin Central System's aggressively competing for market share on traffic (mainly non-captive freight), to, from and within the region served by WC System lines.[8]

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6 Verified Statement of Paul M. Tellier, Canadian National's Chief Executive Officer, p. 2, April 6, 2001, Surface Transportation Board Finance Docket 34000, *Canadian National – Control – Wisconsin Central.*

7 Verified Statement of James M. Foote, Canadian National's Executive Vice President, Sales and Marketing, p. 6, April 6, 2001, FD 34000, *supra.*

8 CN representations were significant, *inter alia*, because they were made in pleadings which became the basis for the Board determining the FD Docket 34000 to be a "minor" proceeding, thus, blocking inconsistent alternative applications.

In the Verified Statement of E. Hunter Harrison, then Canadian National's Chief Executive Officer, in *Canadian National – Control – Elgin Joliet & Eastern,* Finance Docket 35087, October 30, 2007, Canadian National represented to this Board that:

> In the past decade, CN has acquired in the U.S. the Illinois Central, the Wisconsin Central and the GLT systems. As we expected, each of these transactions has added to our capacity to serve customers, and to [increase] our network efficiency. And, **as we promised,** in each transaction, CN met its commitments to integrate the new systems smoothly, **without any reduction in competition,** and to enhance the public interest in rail transportation. [Emphasis added]

In the real world of competition, Mr. Harrison's statement is patently not true. Because CN has and is failing to preserve the Wisconsin Central's "local characteristics," there has been and continues to be a significant reduction in competition, particularly competition for non-captive freight.

CN's Failure to Compete on WC System Lines, 2001-Present.

By way of example, within a relatively short time after establishing its control over the WC System, CN:

- Eliminated the "Wisconsin Central Division" which it had promised to operate "in order to preserve the local characteristics" of the WC System.
- Instituted rationing of railcar supply (CN's so-called "Guaranteed Car Order" system, but quite the opposite), which continues to the present, under which shippers have reported over significant periods, and repeatedly, receiving as few as 60% of railcars ordered, despite the fact

that the railroad was known to have cars of the type ordered "in storage."

- Terminated inspection and cleaning tracks, with resultant increase in delivery of dirty and bad order railcars for loading, increased loss and damage claims, increased destination customer dissatisfaction with their suppliers located on former WC System lines and, for those suppliers, consequent loss of competitiveness in their end markets.[9]
- Withdrew 60-foot boxcars (the basis for certain incentive rates) from lumber traffic originating on former WC System lines for destinations on the West Coast and in the Southwest and, thus, terminated CN's participation in the traffic.
- Increased boxcar rates on hardwood lumber originating on WC System lines in central Wisconsin, destined to Texas, the Southwest and West Coast such that the boxcar rate exceeded the cost on trucking three intermodal containers (equivalent to one boxcar) to intermodal connections in the Chicago area for furtherance to such destinations by 166% and, thus, terminated CN's participation in the traffic.
- Terminated intermodal facilities on former WC System lines including, despite pleas from shippers, Schneider National and other

9 Due to the railroad's rationing of railcar supply, shippers often face the dilemma of having to clean dirty cars themselves or accepting railcars of questionable quality or rejecting the car, doing without and suffering dissatisfaction of their own customers who planned for delivery via rail.

motor carriers, intermodal service between Green Bay and Chicago, operating in part **on its Superior-Chicago mainline** and, thus, terminated CN's participation in the traffic.

- Terminated a rail-to-truck trans-load operation for plastic pellets, on sidetrack **on its Superior-Chicago mainline** and, thus, terminated CN's participation in the traffic.[10]
- Reduced from five and six days to three days per week, switching at pulpwood loading and recyclable facilities located **on its Superior-Chicago mainline**, even though traffic at those facilities had remained strong.
- Declined, in 2008, to quote rates to return to rail a regular weekly movement of boxcars from east central Wisconsin to lower Michigan, routed in part **on its Superior-Chicago mainline**, amounting to some 650 carloads per year which would have taken 1,500 truckloads per year off the highways.[11]

Surveying the opinion of any former Wisconsin Central System shipper, anonymously, insulated from their own perceptions of potential

10 The operation was established in 1997 through the efforts of WC to recruit a local trucker to lease sidetrack and purchase specialized equipment to trans-load plastic pellets from private railcars for local delivery. CN initially attempted to unilaterally terminate the track lease and, failing that, at the next opportunity increased the track rental to a level that forced relocation of the trans-load operation to track on a shortline (at no lease charge) but not as well located for the local deliveries.

11 This is the same shipper whose traffic had increased from 1,000 to 2,400 cars per year as a result of WC System's competitive efforts. The shipper's traffic has now dwindled to fewer than 20 carloads per year, the difference now moving all-highway.

retribution,[12] will yield the opinion that Canadian National has and continues to consistently neglect to compete for, if not outright suppresses, traffic originating and/or terminating on former WC System lines.

CN's Incentives to Suppress WC System Traffic.

Traffic moving via the port of Prince Rupert has already significantly increased international traffic on the Superior-Chicago mainline. The build-out of Prince Rupert capacity by 2015 will dramatically increase this traffic, possibly enough to increase the number of international trains transiting the Superior-Chicago mainline from the current low 20s to the mid-60s.

Canadian National appears to have consistently acted to reserve the available capacity on its Superior-Chicago mainline by neglecting to compete for and, apparently, outright suppressing domestic traffic originating and/or terminating on former WC System lines. The economic incentives of high volume, long-haul, international traffic trumps the economics of retail railroading, shorter-haul (at least on CN) domestic traffic which was the bread-and-butter business of the former WC System.

That would seem incentive enough to explain Canadian National's failure and refusal to compete for market share on former WC System lines. However, for the last several years, CN has also had another

12 We do not suggest that such shipper perceptions are warranted nor that CN has, in fact, engaged in any such retribution.

incentive – the problem of dealing with EJ&E mitigation and oversight. Much of the traffic originating and/or terminating on the former WC System lines transits the Chicago gateway and can only add to CN's burden to comply with mitigation and oversight, such as street-crossing blockages in the communities along the EJ&E line.

The Independent WC System Was and Could Be, Under CN Control, a Competitive Model for Non-Captive Freight.

The historic, independent WC System was a competitive model for aggressive completion for non-captive freight through its prominent role in pricing and maintaining a nationwide network of through routes and rates – that being the most prominent among WC System "local characteristics" which Canadian National promised to preserve and which this Board made a condition of Canadian National's control of the WC System.

Public sector enforcement of the conditions imposed in Finance Docket 34000 on Canadian National's control of Wisconsin Central System has been non-existent. Private enforcement of such conditions appears to require concerted action by many shippers and other stakeholders across central and northern Wisconsin and the Upper Peninsula and great expense. Full, partial or selectively targeted revocation of the Exemptions under consideration in Docket EP 704 may provide reasonable means for case-by-case presentation of these issues to the Board.

Clearly, neither unregulated competition under the Exemptions nor the specific conditions imposed in Finance Docket 34000 have been adequate to assure the survival of the independent WC System's dedication to competing for non-captive freight. Modification of the "competitive access rules and policies" might provide opportunities to restore some of the competitiveness of the former WC System for shippers on its lines. However, there are many practical limitations which would doom that approach to restoring WC System's level of service and competitiveness to delay and, at best, would result in a patchwork and piecemeal result.

The Board's objective in exploring "competition in the railroad industry and possible policy alternative to facilitate more competition" ought to identify the level of competition for non-captive freight as a critical competitiveness problem and consider how to provide incentives and structural or regulatory changes that will facilitate similar competitive models for non-captive freight. Although sympathetic to the concerns of shippers and receivers of captive freight,[13] WCG believes the more

13 Many shippers and receivers on former WC System lines ship and receive some captive freight and are significant consumers of electricity generated by utilities that are captive shippers.

pressing competitiveness problem is rail industry competition for non-captive freight.

Regulatory intervention must be measured and targeted, the minimum necessary to accomplish the purpose. It also must be monitored and adjusted systematically, over time and in response to the evolving character of competition in transportation markets. Such regulatory change needs to foster market incentives such that the regulation is largely self-enforcing or market enforced. WCG opposes any regulatory change that relies to any significant degree on regulatory process or administrative adjudication.

Finally, the Board's consideration of competitiveness in the railroad industry in this Docket needs, now and on an ongoing basis, to take account of the growing role public-private investment in rail and intermodal facilities (*e.g.*, CREATE, Alameda Corridor, Heartland Corridor, Crescent Corridor and many similar projects at federal, state and local levels). How has and will the new and growing role of public-private investment affect rail industry competitiveness?

CONCLUSION AND REQUESTED ACTION

WC Group submits that, as illustrated by the state of competition arising from Canadian National's control of the WC System, the Board's exploration of competition in the railroad industry in this Docket ought to:

1. Focus consideration of regulatory change on creation of incentives and capacity for effective rail-to-rail and modal competition for non-captive freight, including the Board's jurisdiction and remedies available under 49 U.S.C. §§ 11101(a) and 11121-23 (car service);
2. In general,[14] limit and/or defer consideration of regulatory change affecting captive freight, including current reliance on Constrained Market Pricing principles, until effective rail-to-rail and modal competition for non-captive freight (*i.e.*, incentives and capacity) has been firmly established; and
3. Consider the pros and cons of limited and/or targeted adaptation of specific current regulatory policies (alternative through routes and extended pricing authority, terminal facility access, reciprocal switching, bottlenecks and, if necessary, policies on reopening control proceedings) to address failures of competition policy and conditions on Class I consolidations such as those illustrated by ten (10) years of Canadian National's control of the Wisconsin Central System.

Dated this 8th day of April, 2011.

[See the next page, following, for verification.

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14 WCG does not oppose changes that may be sought by captive shippers, so long as they are specifically targeted and so long as they do not impair the capability of the railroads to invest in competing for non-captive freight.

Verification

I, John Duncan Varda, counsel to Wisconsin Central Group, have, since 1970, represented Wisconsin Manufacturers & Commerce and other Wisconsin and Upper Michigan transportation shipper groups and various of their constituent members before the Interstate Commerce Commission and, lately, before the Surface Transportation Board, and do hereby affirm and verify that I have read the foregoing Initial Comments of Wisconsin Central Group and know the facts stated therein to be true and correct to my own knowledge and, as to those stated upon information and belief, I reasonably believe them to be true and correct.

John Duncan Varda

John Duncan Varda

STATE OF WISCONSIN)
) ss
DANE COUNTY)

Personally came before me this 8th day of April, 2011, the above named John Duncan Varda, personally known to me to be the person who executed the foregoing verification and acknowledged the same.

Martha S. Olson

Notary Public, State of Wisconsin

My commission expires: 8/14/2011.